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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL MOSBY et al., Defendants and Appellants.	B281541 (Los Angeles County Super. Ct. No. KA105038)

APPEALS from judgments of the Superior Court of Los Angeles County, Robert Perry, Judge. Affirmed in part; remanded in part with directions.

Paul Couenhoven, under appointment by the Court of Appeal, for Defendant and Appellant Michael Mosby.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant Mariah Jiles.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Michael Mosby and Mariah Jiles were jointly charged with the attempted premeditated murder of Leon Merritt (Pen. Code, §§ 664, 187, subdivision (a))[1], shooting into an occupied vehicle (§ 246), and felony child endangerment (§ 2273a, subd. (a)). The information alleged that during the commission of the attempted murder and shooting at an occupied vehicle, Jiles personally discharged a firearm causing great bodily injury and that Mosby committed a crime in which a principal was armed with a firearm. (§§ 12022.53, subd. (d), 12022, subd. (a)(1).)

Mosby was separately charged with two murders (§ 187) and robberies (§ 211), involving Pedro Rodriguez and William Quezada. The information alleged that during these crimes, Mosby personally discharged a firearm causing death (§ 12022.53, subd. (d)), and included two special circumstance allegations: (1) that the murders were committed while Mosby was engaged in the crime of robbery (§ 190.2, subd. (a)(17)), and that Mosby committed multiple murders (§ 190.2, subd. (a)(3)). Mosby was also charged with pimping Marina Judkins, a minor (§ 266h, subd. (b)(1)).

The jury found Mosby and Jiles guilty of all charges, and found true the enhancements and special circumstances alleged in the information.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Mosby was sentenced to two life-without-parole terms, plus two 25-to-life terms for the murders and related firearm enhancements, a term of life, plus one year for the attempted murder and arming enhancement, and a six-year term for pimping a minor—all to run consecutive to each other. The court stayed the sentences for the two robberies, shooting at an occupied vehicle, and felony child endangerment.

Jiles was sentenced to a term of life, plus 25-to-life for the attempted murder and related firearm allegation, and a two-year term for the child endangerment conviction. The court stayed the sentence for shooting at an occupied motor vehicle, along with the attendant firearm allegation.

Mosby and Jiles, individually and collectively, raise several contentions on appeal. As to Jiles, we agree—and respondent concedes—that her sentencing claims have merit. We remand so the trial court can reconsider the firearms allegations under section 12022.53, subdivision (h), and to correct the abstract of judgment to reflect the restitution amounts orally pronounced by the trial court at its March 30, 2017 restitution hearing. In all other respects, the judgment as to Jiles is affirmed. The judgment as to Mosby is affirmed.

BACKGROUND

I. Factual Overview

Mosby, a pimp, was involved with two of his prostitutes, Jiles and Marina Judkins. Mosby committed an attempted murder with Jiles and two robbery-murders with Judkins. A woman named Tenise Taylor, with whom Mosby also became involved, was present for the two robbery-murders and in one incident assaulted the dying victim before taking his wallet.

Taylor and Judkins entered into plea agreements in exchange for their testimony.

A. Prosecution Evidence

1. April 1, 2014 Leon Merritt Shooting (Counts 6, 7, and 8)

On March 31, 2014, Jiles called her friend Marshawn Lewis, and said she wanted to get together. Lewis said she was busy, but could do it the next day. Jiles and Lewis had recently argued because Lewis told Jiles she should leave Mosby.

The next day, April 1, Mosby was driving an Astro van with Judkins in the front passenger seat; Jiles and her two-year-old child, were in the backseat. Jiles spotted Lewis, and her boyfriend Leon Merritt in a car, and said "There they go." Jiles then called Lewis, told her she was with her baby, and wanted to hang out. Lewis told Jiles she was in the car with her boyfriend Leon Merritt and stated her location. Jiles told Lewis she was nearby and asked Lewis to get out of the car and walk to the corner. Lewis walked to the corner and looked for Jiles while Merritt stayed in his car. Jiles and Mosby debated whom to shoot.

Mosby turned the corner and stopped next to Merritt's car. Jiles opened the sliding back door of the van, moved her child aside, put her arm outside of the van, and fired several shots into Merritt's car.

Merritt lay down on the floor of his car during the shooting. One bullet entered Merritt's thigh, narrowly missing the femoral artery. Another bullet grazed his left arm.

After Jiles stopped shooting, Mosby drove off. Jiles said she got him, and her child repeated her words.

Lewis got in the car with Merritt, and they drove to a friend's house and called 9-1-1. Lewis told the operator that her best friend shot her boyfriend.

Police went to the location of the shooting and recovered three spent .38 caliber bullet casings.

According to Tenise Taylor, Mosby at a later point commented that Jiles shot at a female but missed and shot a male instead. Jiles smiled and nodded in agreement.

2. April 17, 2014 Pedro Rodriguez Robbery and Murder (Counts 1 and 3)

On April 17, 2014, Mosby was driving an El Dorado Cadillac with passengers Judkins, Taylor, and Taylor's then-boyfriend C.J. Taylor and C.J. were in the backseat smoking crystal methamphetamine. Judkins had seen Mosby smoking methamphetamine in the car earlier that day. Mosby kept saying he had to make some money.

Mosby dropped off Judkins at the corner of 47th and Figueroa to "get a date." Pedro Rodriguez pulled up in a white pickup truck and Judkins got in and directed Rodriguez to park on a nearby side street. As Judkins was negotiating her price, Mosby drove up and blocked the path of Rodriguez's truck. Mosby jumped out of his car and walked up to the driver's side of the truck with a gun in his hand. Mosby told Rodriguez, "give me the money." Mosby fired several shots at Rodriguez from outside the driver's side of the truck. Mosby took Rodriguez's wallet and drove off.

A neighbor found Rodriguez's body the next day. He had two gunshot wounds, one of which fatally pierced his aorta.

Police found a .380 bullet casing in the street near Rodriguez's white truck, and a bullet was recovered from Rodriguez's body.

3. April 23, 2014 William Quezada Robbery and Murder (Counts 2 and 4)

On the afternoon of April 23, 2014, Mosby, Judkins, and Taylor were in Mosby's Cadillac, and stopped to pick up Mosby's friend Frank Winzer.

Mosby and Tayler had smoked crystal methamphetamine all night. According to Judkins, Mosby and Winzer smoked methamphetamine in front of Winzer's house. Mosby acted differently when he used methamphetamine. Mosby smoked methamphetamine as much as five days a week. When he used the drug, he acted angrier than usual.

Mosby dropped Judkins off on the corner of 47th and Figueroa so she could "look for tricks." William Quezada pulled up in a small blue pickup truck and asked for oral sex. Judkins directed Quezada to park in the same place where Rodriguez was shot.

Mosby parked his car two or three car lengths behind the truck. As Judkins was negotiating her price, Mosby approached the passenger side of the truck and got in. Mosby was holding a gun in his hand, and told Judkins to "get him" and she grabbed Quezada. Quezada was trying to get out through the driver's side window. Mosby climbed over Judkins, grabbed Quezada, and shot him "once or twice." Quezada managed to escape out of the truck window, started running, and then crawled down the street, screaming for help.

Mosby and Judkins got back into Mosby's car. After realizing they did not have Quezada's wallet, Mosby drove up to

Quezada and told Taylor, "get me that money." Taylor got out of the car, kicked Quezada in the back several times, and took his wallet.

Quezada died as a result of multiple gunshot wounds. Quezada had been shot three times. Police found three .380 caliber bullet casings inside Quezada's truck, and a bullet was recovered from Quezada's body.

4. Arrest of Mosby, Judkins, and Jiles

On April 25, 2014, Mosby, Jiles, and Judkins were driving in Mosby's blue Cadillac when police stopped the car. Police surrounded the car with guns drawn, and arrested all three occupants.

Police found a black .380 semi-automatic pistol between the driver and passenger seat, and a document with the name Pedro Rodriguez in the trunk. Forensic analysis established that the bullets recovered from the bodies of Rodriguez and Quezada—and all casings found at the scenes of the shootings on April 1, 17, and 24—were fired from the same gun found in Mosby's blue Cadillac.

B. Defense Evidence

1. Mosby's Case

Dr. William Wirshing testified as an expert on the effects of crystal methamphetamine on the brain. Use of crystal methamphetamine, especially extended use, affects the frontal systems of the brain that are involved in planning, consideration, and emotional control. When used chronically, the drug erodes these frontal systems and the effects accumulate over time. The drug compromises a person's capacity to consider their actions and resist impulses. It does not destroy a person's ability to deliberate and consider the consequences of their actions, but it does impair their capacity to think and reason over time.

Methamphetamine is a long-acting drug, with a half-life of 12 to 20 hours. During the withdrawal phase, a person typically experiences increased irritability, impulsivity, and anger. Over time, use of the drug causes loss of neurons and results in cumulative brain injury.

2. Jiles's case

Jiles presented an alibi defense. She lived with her mother in an apartment complex in Van Nuys. On the day of the Merritt shooting, apartment manager Dominique Cruz, saw Jiles in the morning and then later around 6:00 or 6:30 p.m. when Jiles tried to pay her rent in cash.[2] Cruz sent Jiles to get a money order, and Jiles returned with the order around 7:00 p.m.

C. Prosecution's rebuttal case

Cruz told Jiles's investigator that she took Jiles to 7-Eleven around 7:30 p.m. on the day of the Merritt shooting. Jiles's mother told the investigator that her son and Jiles went to 7-Eleven together to get a money order. She was adamant that Jiles was with her that evening.

However, within a few days of Jiles's arrest, her mother called police detective Everardo Amaral to discuss her daughter, but never mentioned being with her at the time of the shooting.

DISCUSSION

I. Felony Child Endangerment Convictions

Mosby and Jiles contend their convictions for felony child endangerment must be reversed because there was insufficient evidence to prove Jiles's child was placed in a situation "likely to produce great bodily harm or death." (§ 273a, subd. (a).) Specifically, they argue that since Jiles pushed her child out of

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[2] Lewis testified the shooting took place around 6:00 p.m. and that she was interviewed by police around 6:20 p.m.

the "line of fire" prior to firing the weapon, her child was unlikely to suffer either great bodily injury or death. As discussed below, we find no merit to this argument.

A. Relevant Law and Standard of Review

To assess the sufficiency of evidence, "we review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Cole* (2004) 33 Cal.4th 1158, 1212.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.) We must accept logical inferences the jury might have drawn from the evidence even if we would have concluded otherwise. (*People v. Solomon* (2010) 49 Cal.4th 792, 811-812.)

Section 273a, subdivision (a) provides in relevant part, "[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished . . . ."

A violation of section 273a "can occur in a wide variety of situations: the definition broadly includes both active and

passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect." (*People v. Smith* (1984) 35 Cal.3d 798, 806.) "Two threshold considerations, however, govern all types of conduct prohibited by this law: first, the conduct must be willful; second, it must be committed 'under circumstances or conditions likely to produce great bodily harm or death.' [Citation.] Absent either of these elements, there can be no violation of the statute." (*Ibid.*)

B. Discussion

The definition of "likely," for purposes of section 273a, subdivision (a), has been the subject of some disagreement among courts. (Compare *People v. Sargent* (1999) 19 Cal.4th 1206, 1223 [trier of fact determines whether act was done under conditions " 'in which the probability of serious injury is great' "]; *People v. Chaffin* (2009) 173 Cal.App.4th 1348, 1352, [same]; with *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 917, 922, [statement in *Sargent*, quoted ante, was "said in passing"; phrase "*likely* to engage in acts of sexual violence," as used in Sexually Violent Predators Act, means person presents substantial danger, i.e., serious and well-founded risk, of reoffending]; *People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204 (*Wilson*) ["likely" in context of section 273a "means a substantial danger, i.e., a serious and well-founded risk, of great bodily harm or death"].)

Under either definition, the evidence here is sufficient to support the convictions.

Jiles was not engaged in target practice in a remote area; she fired multiple shots during a drive-by shooting committed in the early evening on the streets of Los Angeles.[3] (Cf. *People v.*

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[3] The shooting took place on the corner of 35th Place and St. Andrews Place, near Jefferson Park.

Nieto Benitez (1992) 4 Cal.4th 91, 114 (conc. opn. of Mosk, J.) [positing that if "in a remote part of a rural county, a hunter, for no apparent reason, fired a bullet into the air at a 45-degree angle, causing a human death on the ground some distance away," such act "could result in injury or death" but there would be "no high probability" of such consequences]; *People v. Clem* (2000) 78 Cal.App.4th 346, 351-353 [commenting that "[i]f there are isolated places in this populous state" where the discharge of a firearm posed no threat to human life, then such an act would not be inherently dangerous].)

Jiles's shooting was not only a volatile act in its own right, but also brought with it the additional risk of return fire—either from the intended target, or an innocent bystander. (Cf. *People v. Gallegos* (1997) 54 Cal.App.4th 453, 461-462 [act of shooting at victim in public setting carried "high probability" risk that there would be a life-threatening response "from the attempted murder victim, or from anyone else present, for that matter"].) The fact that Jiles may have intended to simply "get" Merritt or Lewis and leave the area safely with her child, is irrelevant to the inquiry. (Cf. *People v. Valdez* (2002) 27 Cal.4th 778, 786 [stating a defendant need not "anticipate nor have any particular intent or knowledge" with respect to whether circumstances are likely to produce harm or death].)

The section 273a convictions are supported by substantial evidence.[4]

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[4] In analyzing the claim, Respondent discusses the mental state of criminal negligence and, quoting *People v. Hansen* (1997) 59 Cal.App.4th 473 (*Hansen*), concludes defendants permitted Jiles's child to be placed in a situation in which serious physical

II. Denial of Jiles's Severance Motion

Jiles contends the trial court abused its discretion, and violated her constitutional right to fair trial, by denying her motion to sever the attempted murder charges from Mosby's separate robbery-murder charges.

Jiles filed a pretrial motion to sever counts 6, 7, and 8 (relating to victim Merritt) from counts 1 through 5 (relating to victims Rodriguez and Quezada), on grounds the latter murders

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danger was "reasonably foreseeable." However, this language from *Hansen* is inapplicable here.

In *Hansen*, the defendant was convicted for felony child endangerment after initiating a game of Russian Roulette with minors which resulted in one minor's death. (*Hansen*, *supra*, 59 Cal.App.4th at pp. 476-478.) On appeal, the defendant contended the evidence was insufficient because the victim's independent act of pulling the trigger broke the chain of causation. (*Id.* at pp. 478, 481-482.) The court rejected the claim, concluding the victim's intervening act was a "reasonably foreseeable" result of Hansen's criminally negligent conduct. (*Id.* at pp. 479-482.) There was no claim that the context itself—i.e. playing Russian Roulette with a loaded gun—was not "likely" to produce great bodily harm or death. (Cf. *People v. Valdez*, *supra*, 27 Cal.4th at p. 786 [whether situation is one in which harm or death is likely is a separate measure of culpability "extrinsic to the intent element"]; *People v. Deskin* (1992) 10 Cal.App.4th 1397, 1401-1402 ["If the act is done under circumstances or conditions likely to produce great bodily injury or death, it is a felony; if not, the same proscribed act is a misdemeanor"].) Appellants do not challenge the sufficiency of evidence regarding the element of intent, nor do they challenge the chain of causation.

would result in potential spill-over prejudice.[5] The trial court denied the motion, citing the overlap of evidence, use of the same weapon, and closeness in time. Jiles renewed the motion orally during trial, in anticipation of Judkins testifying to additional robberies similar to the ones connected to the robbery-murder charges. The severance was denied. Jiles's motion for a new trial, based in part on the denial of her motions to sever, was also denied.

A. Relevant Law and Standard of Review

A trial court's denial of a severance motion is reviewed for abuse of discretion based on the facts as they appeared at the time the court ruled on the motion. (*People v. Turner* (1984) 37 Cal.3d 302, 312.) If the court's ruling was proper when it was made, however, we may reverse a judgment only on a showing that joinder resulted in " 'gross unfairness' amounting to a denial of due process." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150.)

There is, as our Supreme Court has noted, "a statutory preference for joint trials of jointly charged defendants." (*People v. Masters* (2016) 62 Cal.4th 1019, 1048.) Section 1098 provides that "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they *must* be tried jointly, unless the court order[s] separate trials." (Italics added.) The court may, in its discretion, order separate trials in

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[5] At the time of the motion, Judkins and Taylor were codefendants charged with the robbery-murders separate from Jiles. Although Jiles's severance motion specifies that Jiles is seeking severance of counts 1 through 5, the motion also stated she is asking the court to order that she be tried "separately from co-defendants Michael Mosby, Marina Judkins, and Tenise Taylor."

the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony. (*People v. Massie* (1967) 66 Cal.2d 899, 916-917.)

Where the joinder of defendants includes charges arising out of separate criminal episodes, the analysis is more akin to situations involving joinder of counts under section 954 and includes consideration of whether: (1) evidence of the crimes would be cross-admissible; (2) some charges are likely to inflame the jury against the defendant; (3) a weak case has been joined with a strong one, or with another weak case; and (4) any of the charges is a potentially capital offense. (*Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 938-939 (*Calderon*).)

When the statutory requirements for joinder have been met, the defendant can demonstrate error in the denial of a motion to sever only by a clear showing of potential prejudice. (*People v. Soper* (2009) 45 Cal.4th 759, 774.)

B. Discussion

Jiles concedes joinder of all counts was proper in the first instance because the offenses, violent assaultive crimes against a person, were of the same class. (See *People v. Leney* (1989) 213 Cal.App.3d 265, 269*; People v. Lucky* (1988) 45 Cal.3d 259, 276.) Jiles further concedes evidence regarding the weapon used in all charged crimes was cross-admissible, but argues the details of the Quezada and Rodriguez murders were not admissible against her for any valid non-propensity purpose. However, cross-admissibility pertains to the admissibility of evidence tending to prove a disputed fact of consequence, not the general cross-admissibility of another charged offense. (*People v. Geier* (2007)

41 Cal.4th 555, 576, overruling recognized on a different ground by *People v. Seumanu* (2015) 61 Cal.4th 1293, 1320.) Moreover, due to the preference for joinder, the trial court's discretion is broader in ruling on a motion for severance than in ruling on admissibility of evidence. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1221.) Cross-admissibility is "normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*People v. Soper*, *supra*, 45 Cal.4th at pp. 774-775.)

Relying on *Calderon*, *supra*, 87 Cal.App.4th 933, Jiles maintains there was clear prejudice due to the highly inflammatory nature of Mosby's separate robbery-murder charges, and the fact that she raised an alibi defense for the attempted murder while Mosby conceded the murders.

In *Calderon*, the trial court consolidated a case against the defendant and codefendant charged with attempted murder with a case against solely the codefendant for a murder involving a separate incident. (*Calderon*, *supra*, 87 Cal.App.4th at p. 935.) The *Calderon* court determined the murder incident was highly inflammatory because it involved not only a gratuitous shooting of one victim, but also the execution-style murder of the other victim, while the attempted murder took place amidst a perceived challenge. (*Id.* at p. 941.) The court further determined the case involving Calderon was weaker than the case involving the other codefendant because of the confessions in the latter and the weakness of the witness identification in the former. (*Ibid.*)

While the parties disagree over which charges were more inflammatory—the attempted murder committed with Jiles's young child in the car or the robbery-murders with special circumstance allegations—we need not resolve the dispute.

The fundamental danger to be avoided in joinder of offenses is that strong evidence of one crime will be used to bolster a weak case on another. (*People v. Hill* (1995) 34 Cal.App.4th 727, 735-736.) Here, Jiles's alibi was weak and contradicted, while the testimony of four witnesses pointed to Jiles as the shooter. True, Judkins and Taylor testified in exchange for plea deals. However, Merritt and Lewis, who were well acquainted with Jiles, were unequivocal in their identification of Jiles—both as the shooter and the person who telephoned Lewis prior to the shooting and directed Lewis to the corner.[6] Thus, it was the evidence supporting the attempted murder charges which undermined Jiles's alibi defense and resulting chance at acquittal, rather than joinder with Mosby and his additional charges.[7]

Jiles has failed to show the prejudice required to establish the trial court abused its discretion. Likewise, Jiles has failed to demonstrate that joinder resulted in gross unfairness amounting to a denial of due process. (*People v. Simon* (2016) 1 Cal.5th 98, 129 [strong evidence supporting each incident negated any "undue risk of unjustified conviction" from joinder].)

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[6] Merritt heard the phone conversation between Jiles and Lewis because the cell phone was connected to his car stereo system via Bluetooth.

[7] Jiles does not allege prejudice from joinder with Mosby on the common attempted murder charge. Nor could she. Mosby did not take the stand to testify, while defense counsel focused his arguments to the jury on the robbery-murder charges. (*People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 150 [joint trial of codefendants prohibited only where defenses are wholly irreconcilable].)

III. Exclusion of Dr. Light's Testimony

Mosby contends the trial court abused its discretion, and violated his constitutional right to a complete defense, when it excluded the testimony of Dr. Light, a clinical neuropsychologist. The proffered basis for Dr. Light's testimony was a report prepared by Dr. Light after he conducted neuropsychological tests on Mosby.[8] Mosby's counsel contended Dr. Light's conclusions would lend credence to Dr. Wirshing's testimony on the effects of methamphetamine use. The trial court disagreed, and found Dr. Light's testimony irrelevant under sections 28 and 29 and, if not irrelevant, inadmissible under Evidence Code section 352. We agree with the trial court.

A. Standard of Review and Applicable Law

A criminal defendant has a due process right to the assistance of expert witnesses, including the right to consult with a psychiatrist or psychologist, if necessary, to prepare his defense. (*Ake v. Oklahoma* (1985) 470 U.S. 68, 83.) The Sixth and Fourteenth Amendments to the United States Constitution also guarantee a defendant's right to present the testimony of these expert witnesses at trial. (*Doe v. Superior Court* (1995) 39 Cal.App.4th 538, 543, disapproved on another ground by *James G. v. Superior Court* (2000) 80 Cal.App.4th 275, 284.) Nonetheless, expert psychiatric testimony may be limited by statute. (*People v. Saille* (1991) 54 Cal.3d 1103.)

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[8] Dr. Light's report is part of the augmented record. The parties initially moved to further augment the record with a settled statement regarding the trial court's ruling on the issue. This court granted the motion on June 12, 2018, but the order was subsequently vacated after Mosby submitted a letter indicating the trial court's ruling appears on the record.

Section 28, subdivision (a) provides that evidence of mental illness "shall not be admitted to show or negate the *capacity* to form any mental state." (Italics added.) Subdivision (b) of section 28 states that as a "matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action . . . ." Instead, evidence of mental disease or defect "is admissible solely on the issue of whether or not the accused *actually* formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." (Italics added.)

Section 29 prohibits expert witnesses from directly stating their conclusions regarding whether a defendant possessed a required mental state. It provides, "[i]n the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states . . . . *The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact*." (Italics added.)

A trial court's ruling under Evidence Code section 352 is reviewed for abuse of discretion (*People v. Clark* (2016) 63 Cal.4th 522, 586), and will not be disturbed on appeal unless exercised in an "arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

B. Discussion

The report prepared by Dr. Light indicates he administered a battery of tests to Mosby in areas which included language, memory, intellectual, executive and psychological function.

Mosby concedes portions of Dr. Light's testing and conclusions had no relevance, but contends Light's testing and opinions about Mosby's "executive functioning" were relevant and crucial to his defense that he did not premeditate the murders.[9] We disagree.

Dr. Light concluded that Mosby's variable performance across all areas of cognitive, psychological testing (including those deemed irrelevant by Mosby) indicated potential brain dysfunction, and that one of those areas included the "higher level" tasks within the category of executive function. Dr. Light does not, in his final impressions, explain which executive skills were deficient—and/or how these skills would relate to planning or maintaining goal-directed behavior. Since the majority of Mosby's tests under the category of Executive Functioning were within normal limits, it is clear Mosby is not deficient in this entire category. Indeed, Mosby not only tested within normal limits on most tests administered under the category, his performance on a set of "Trail Making" tests—a measure described by Dr. Light as "*most sensitive to executive dysfunction*"—were all within normal limits, while the one task which did yield a "deficient" score was followed up with testing which showed improvement into the normal range.

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[9] Defense counsel argued the two murders committed by Mosby were second degree murders because there was no premeditation or deliberation—and further—that he did not form the intent to rob until after the murders took place. In making this argument defense counsel conceded Mosby had the mental capacity to—and actually did—form the specific intent to kill, i.e. harbored malice aforethought, and, further, that Mosby had the mental capacity to—and actually did—form the specific intent to commit each robbery.

Based on Dr. Light's report, we cannot fault the trial court for finding that his conclusions were either irrelevant and/or would be more likely to confuse, rather than assist, the jury in its determination on the issue of premeditation and intent.[10] (*People v. Harris* (2005) 37 Cal.4th 310, 337 [" 'The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive' "].)

However, Mosby's arguments reveal a second problem. Mosby argues Dr. Wirshing should have been allowed to testify how the "mental defect" identified by Dr. Light, "in combination with [Mosby]'s methamphetamine use, affected the areas of specific intent, deliberation and premeditation." He further asserts that "[l]earning that [Mosby] had organic *brain damage* that affected his executive functioning, the *part of the brain* involved in planning, was *highly probative* to a key issue in the case: whether [Mosby] premeditated before killing two men."

However, the very reason Mosby finds these purported conclusions so "crucial" to his defense is because they would usurp or undermine the jury's fact-finding role and effectively direct a verdict on the question of premeditation—as prohibited under sections 28 and 29.

That is, an expert is not only prohibited from opining that the specific defendant on trial did not *actually* form the requisite intent, but that the *brain* of this specific defendant was defective

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[10] Mosby did not proffer any other conclusions or observations Dr. Light might offer beyond those stated in the report. (See *People v. Demond* (1976) 59 Cal.App.3d 574, 588, [failure to make an offer of proof regarding the materiality of the excluded evidence forecloses challenge on appeal].)

in such a manner that it was *incapable* of engaging in the necessary processes to form the requisite intent. To suggest the defendant's brain was not fully incapacitated, but merely partially damaged or deficient, is akin to stating one is not raising a full insanity defense but one of diminished capacity. The defense of diminished capacity has been abolished and only testimony which is permitted under sections 28, 29—and would assist the trier of fact in its factual determination—is admissible. The testimony of Dr. Wirshing—discussing the *general* effects of methamphetamine on a user and his or her brain – was within permissible bounds. (See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 589-591 [expert testified on general effects of chronic drug use, i.e. paranoia, impulsivity, and depletion of neurotransmitters].)

Because Mosby's purported evidence failed to meet the threshold requirement of relevance, and ran the risk of violating the boundaries set by sections 28 and 29, its exclusion did not implicate due process concerns. (*People v. Saille*, *supra*, 54 Cal.3d at p. 1116 [abolition of diminished capacity defense does not violate due process right to present a defense]; *People v. Reeder* (1978) 82 Cal.App.3d 543, 553 [Evidence Code section 352 must bow to constitutional rights of defendant to present "relevant evidence of *significant* probative value to his defense" not that which is "limited in probative value," (original italics)].)

IV. Constitutionality of Special Circumstance

Mosby claims that imposing a sentence of life without the possibility of parole based on the felony-murder special circumstance constitutes cruel and unusual punishment and violates his due process rights. He contends it fails to provide a meaningful basis for the jury to distinguish between finding him

guilty of first degree murder and finding the special circumstance true.

As Mosby concedes, our Supreme Court has rejected this claim before—even when considering the more severe sentence of death. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1195 ["This court has consistently rejected the claim that the statutory special circumstances, including the felony-murder special circumstance, do not adequately narrow the class of persons subject to the death penalty"].) We, too, reject it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

To the extent Mosby asks this court to address the merits of his claim so we may urge the California Supreme Court to reconsider the issue, we decline the invitation. Mosby provides no new argument, legal developments—or other extenuating circumstances—warranting reexamination of prior case law on the issue. (*People v. Johnson* (2016) 62 Cal.4th 600, 642; cf. *In re Javier A.* (1984) 159 Cal.App.3d 913, 956.)

V. Amendments of Sections 12022.5 and 12022.53

The jury found true the allegation that Jiles personally used a firearm within the meaning of section 12022.53 as to charged counts. The court imposed a 25-to-life sentence for the firearm enhancement connected to the attempted murder charge, and stayed punishment for both the enhancement and related count of shooting at an occupied vehicle.

On October 11, 2017, the Governor signed Senate Bill No. 620, which amends section 12022.53 to give the trial court the authority to strike in the interests of justice a firearm enhancement allegation found true under that statute. Effective January 1, 2018, section 12022.53, subdivision (h), is amended to state: "The court may, in the interest of justice pursuant to

Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2(h).)

Citing *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), Jiles argues that the section 12022.53, subdivision (h), amendment applies because her judgment is not yet final. We agree. Under *Estrada*, courts presume that, absent evidence to the contrary, the Legislature intends an amendment reducing punishment under a criminal statute to apply retroactively to cases not yet final on appeal. (*Estrada*, at pp. 747-748; see *People v. Brown* (2012) 54 Cal.4th 314, 324.) *Estrada* has been applied not only to amendments reducing the penalty for a particular offense, but also to amendments giving the court the discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 75.)

Respondent agrees that the amendment to section 12022.53 is subject to the *Estrada* rule and that remand is necessary to allow the trial court to exercise its discretion conferred by Senate Bill No. 620.

Although we express no opinion as to how the trial court should exercise its newly granted discretion under section 12022.53, subdivision (h), on remand, we remand so that it may exercise this discretion in the first instance.

VI. Discrepancy between Oral Pronouncement and Abstract of Judgment

At a March 30, 2017 restitution hearing, the trial court ordered Mosby to pay victim restitution in the amount of $16,147.91 for victims Rodriguez, Quezada, and Merritt. Of this amount, $5,486.41 was for victim Merritt, and Jiles was ordered

to pay this amount only. However, the clerk's minutes and abstract of judgment indicate Jiles is responsible for $16,147.91.

The oral pronouncement of judgment is a judicial act, while entry of judgment into the minutes or other court records is merely a ministerial act. (*People v. Hartsell* (1973) 34 Cal.App.3d 8, 13.) As such, the abstract of judgment "cannot add or modify the judgment which it purports to digest or summarize." (*People v. Caudillo* (1980) 101 Cal.App.3d 122, 126.) "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.)

The parties concur that, as to Jiles, the abstract of judgment must be amended to correctly reflect the trial court's oral pronouncement of $5,486.41 in victim restitution. We agree, and direct the requisite modification be made.

DISPOSITION

The judgment against Michael Mosby is affirmed. As to Mariah Jiles, the trial court is directed to reconsider the firearm enhancements (both imposed and stayed) and to modify the abstract of judgment to reflect imposition of victim restitution in the amount of $5,486.41. In all other respects, the judgment against Jiles is affirmed.

The clerk of the superior court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.